

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-208342

DATE: August 17, 1982

MATTER OF: 50 State Security Service, Inc.

DIGEST:

1. GAO does not review affirmative determinations of responsibility except when the contracting officer's actions are tantamount to fraud or bad faith or when the question of responsibility depends upon the bidder's meeting specific and objective standards included in the solicitation.
2. When definitive responsibility criteria are included in a solicitation, the contracting agency is attempting to insure the existence of unusual expertise or specialized facilities necessary for performance, and compliance with them is a prerequisite to an affirmative determination of responsibility.
3. Solicitation requirement that a prospective contractor have a "present capability" to perform properly and in a timely manner does not create a definitive responsibility criterion.

This is a post-award protest by 50 State Security Service, Inc. against the General Services Administration's award of a contract for guard services in various buildings in the Miami, Florida area. We dismiss the protest.

GSA awarded the contract, No. GS-04-B-82518, to Diamond Detective Agency, the low bidder, on June 8, 1982, for services to begin on July 1. On June 23, the protester states, it learned that Diamond intended to

have the services performed by a firm known as Bayside Security. According to the protester, Florida state officials advised that Bayside Security was a sole proprietorship, licensed in Florida and owned by the same individual who owned part or all of the stock in Diamond.

In a protest to GSA, 50 State Security Service argued that the award was improper because Diamond lacked a Florida license and--contrary to an express prohibition in the solicitation--intended to subcontract to Bayside Security. The protester contended that the two firms were separate legal entities, since they had separate assets and liabilities; that Diamond could not use Bayside Security's state license; and that their common ownership was irrelevant.

The contracting officer responded that from a pre-award survey and discussions with Florida officials, she had learned that Diamond could not be licensed in the state because its name was similar to another firm's registered trade name; it therefore had adopted the name Bayside Security for licensing purposes. GSA determined that the difference between the two firms was in name only and, on the basis of Diamond's satisfactory past performance and corporate financial position, found it responsible. Although the firm did not bid as "Diamond Detective Agency doing business as Bayside Security," the contracting officer states that GSA is satisfied that Diamond is not subcontracting.

In its protest to our Office, 50 State Security Service makes the same allegations that it had made to GSA, and further argues that the award was improper because Diamond could not meet a definitive responsibility criterion requiring bidders to demonstrate a "present capability to properly and in a timely manner perform the work required." According to the protester, at the time of award, Diamond was only capable of performing through a subcontract, which was not a permissible option.

It is apparent that 50 State Security Service's basis of protest is the contracting officer's determination that Diamond was a responsible prospective contractor. Our Office, however, has adopted a policy of not reviewing affirmative determinations of responsibility. We recognize that these involve subjective

business judgments and are essentially within the discretion of the contracting officer. There are two exceptions to this rule: when the contracting officer's actions are tantamount to fraud or bad faith or when the question of responsibility depends upon the bidder's meeting specific and objective standards included in the solicitation. Auto Discount Rent-N-Drive Systems, Inc., et al., B-197236, July 28, 1980, 80-2 CPD 73, and cases cited therein.

In this case, the protester has neither alleged nor provided evidence of fraud or bad faith. The issue is therefore whether "present capability" to perform constitutes a definitive responsibility criterion. In our view, it does not.

When such criteria are included in a solicitation, the contracting agency is attempting to insure the existence of unusual expertise or specialized facilities necessary for adequate performance. Compliance with these special, minimum standards is a prerequisite to an affirmative determination of responsibility. Haughton Elevator Division, Reliance Electric Company, 55 Comp. Gen. 1051 (1976), 76-1 CPD 294. For example, a certain degree or number of years of experience, a specific business or professional certificate, or facilities in a particular location would constitute definitive responsibility criteria.

A solicitation requirement to demonstrate a "present capability to properly and in a timely manner perform the work required" is no more than a minimum standard of responsibility that all prospective contractors must meet. See Federal Procurement Regulations § 1-1.1203-1 (1964 ed.). It is not a definitive responsibility criterion.

The protest is dismissed.

Harry R. Van Cleve
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Acting General Counsel